THE EXPANDING SCOPE, USE, AND AVAILABILITY OF CRIMINAL RECORDS

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INTRODUCTION

Criminal records[1] play an important and often decisive role in the processing of a criminal case at every stage, from arrest through parole.[2] They are also rapidly becoming a negative curriculum vitae (negative c.v.)[3] used to determine eligibility for occupational licenses, social welfare benefits, employment, and housing.[4] Indeed, federal and state laws increasingly authorize and sometimes mandate back-

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1. The United States Code defines criminal history records as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release." 42 U.S.C. § 14616 (2000).

2. *See generally* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997) (discussing the importance of a criminal record in criminal justice system decision-making, especially in sentencing).

3. A negative curriculum vitae is a stigma that brands the individual as unreliable and perhaps dangerous. *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 420 (2006) (describing stigma of criminal record as a "negative curriculum vitae"). *See also* David R. Jones, *Giving Felons a Second Chance*, N.Y. AMSTERDAM NEWS, Dec. 13–19, 2007, at 5 ("The effect of a felony conviction on job prospects for [paroled men in New York] is disastrous."); Adrian Walker, *Fairness for Ex-Offenders*, BOSTON GLOBE, Oct. 3, 2005, at B1 (discussing the stigma of ex-offenders and the barriers to "reentry").

4. *See* AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7, 9 (3rd ed. 2004), *available at* http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf. *See also* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 939 (2003). *See generally* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY (2004), *available at* http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf (providing a comprehensive study of state and federal laws disqualifying ex-offenders from political rights, social welfare benefits, and public and private employment).

ground checks for individuals working in settings with vulnerable populations or susceptibility to criminal or terrorist infiltration.[5] Journalists also frequently initiate criminal background checks on people in the news.[6] Private information service companies warn employers, landlords, hotels, and other businesses that failure to conduct criminal background checks could result in significant tort liabilities.[7] Consequently, the market for criminal background checks has increased dramatically.

Today, more types of conduct also result in the creation of criminal and quasi-criminal records. The Federal Bureau of Investigations (FBI) has recently proposed adding the arrests of adults and juveniles for minor offenses to the types of criminal records it accepts from the states for inclusion in the National Crime Information Center (NCIC).[8] Information stored in the NCIC is available to law enforcement and certain nongovernmental users throughout the country. The FBI has also steadily increased the number of NCIC databases to include new quasi-criminal categories reporting immigration law violators, subjects of domestic violence restraining orders, and suspected members of violent gangs and terrorist organizations.[9]

This expansion of the availability, use, and scope of criminal records poses a serious challenge to reformers seeking to smooth the reentry of ex-offenders in the community.[10] Overcoming the disadvantages of a criminal record, however, is not just a challenge for those being released from prison; it is a challenge for anyone who has been officially labeled a criminal.[11] Persons stigmatized with a crimi-

5. *See infra* notes 202–206 and accompanying text.

6. *See, e.g.*, Brea Jones, *Use Public Records to Cover Candidates and Contributors*, 94 QUILL 27, 27 (2006) ("As standard procedure, some newspapers routinely check the background of political candidates.").

7. *See, e.g.*, ChoicePoint, http://www.choicepoint.com (last visited Feb. 14, 2008) (a private information service company); USLaw.com, Employee Lawsuits: Negligent Hiring and Retention, http://www.uslaw.com/library/article/carel5NegligentHiring.html?area_id=43 (last visited Nov. 20, 2007) (advertising the need for employers to check criminal records). *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 40 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rntfptcj.pdf [hereinafter BJS PRIVACY TASK FORCE REPORT].

8. *See infra* Part II.

9. *See infra* Part III.

10. *See generally* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005) (describing the policy challenges of prisoner reentry); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLEE AND PRISONER REENTRY 105–09 (2003) (describing how the use of criminal records hinders ex-prisioner reintegration).

11. *See* Pager, *supra* note 4, at 942–43, 943 n.7 (finding comparatively worse employment opportunities for job applicants with some contact with the criminal justice

nal label face de jure and de facto discrimination in employment, housing, and access to government social welfare benefits.[12] Restricted socio-economic opportunities make re-offending more likely. Ironically then, the consequence of the more expansive criminal records system may be more crime.

This Article documents how criminal history records are expanding in scope and how their dissemination is proliferating. By illuminating the complexity of the U.S. criminal records system, this Article shows why reform is difficult to design and implement. Part I of this essay discusses the three different sources of criminal records, specifically state and federal criminal records repositories, court records, and commercial information vendors. Part II documents the increasing scope of criminal records, which are soon likely to include information pertaining to non-serious and juvenile offenses. Part III of this essay describes federal criminal records databases such as the Immigration Violators File, the Violent Gang and Terrorist File, and the Protection Order File. Part IV discusses fingerprint and DNA databases, and Part V discusses the increased accessibility of criminal records resulting from federal and state law. Finally, Part VI offers general policy reflections on the nearly public system of criminal records.

I.
Sources of Criminal Records

There are three principal sources of criminal records: executive branch criminal records repositories, courts and offices of court administration, and commercial information vendors. The existence of three separate, albeit interconnected, systems makes the formulation and effective implementation of criminal records policy extremely complicated. Moreover, advances in information technology have

system, including those who were charged but later acquitted); Bruce Western, Punishment and Inequality in America 4–5 (2006) (describing how employers are reluctant to hire individuals with criminal records).

12. De jure discrimination against ex-offenders (frequently called "collateral sanctions") disqualifies ex-offenders from occupational licenses, voting, and social welfare benefits. *See generally* Jeff Manza, Locked Out: Felon Disenfranchisement and American Democracy (2006) (providing a definitive study of felon disenfranchisement). Corporations, landlords, voluntary organizations, and others frequently exercise de facto discrimination against ex-offenders. *See generally* Devah Pager, Marked: Race, Crime & Finding Work in an Era of Mass Incarceration (2007) (providing a comprehensive study of employment discrimination against ex-offenders). *See also* Western, *supra* note 11 (providing a socio-economic study of ex-offenders' employment problems).

made each of these three criminal records systems more comprehensive, efficient, and easier to use.

A. Executive Branch Criminal Records Repositories and Rap Sheets

Every state maintains a criminal records repository to which police, prosecutors, and courts send fingerprints and arrest data, charges, and dispositions.[13] The names of these repositories differ from state to state. Examples include the Kansas Central Repository,[14] the Nevada Criminal History Records Repository,[15] and the New York State Division of Criminal Justice Service.[16] In 2003, the U.S. Bureau of Justice Statistics estimated that state criminal records repositories held over seventy-one million criminal history records.[17]

Increased federal funding for the improvement and expansion of state criminal record keeping resulted from the 1993 Brady Handgun Violence Prevention Act (popularly known as the Brady Act or Brady Law).[18] The Brady Law required the development of a working National Instant Criminal Background Check System (NICS) capable of immediately notifying a retail firearms dealer whether a prospective firearms purchaser had a criminal record or other disqualification.[19] In order to make NICS a reality, Congress established and generously funded the National Criminal History Improvement Program (NCHIP)[20] to provide technical and financial assistance to states to

13. Bureau of Justice Statistics, Justice Statistics Improvement Programs, http://www.ojp.usdoj.gov/bjs/jrip.htm (last visited Nov. 20, 2007).

14. Kansas Bureau of Investigation, Kansas Criminal History Record Checks, Frequent Questions, http://www.accesskansas.org/kbi/criminalhistory/faq.shtml (last visited Feb. 6, 2008).

15. Nevada Department of Public Safety, Records and Technology Division, http://www.nvrepository.state.nv.us (last visited Feb. 6, 2008).

16. New York State Division of Criminal Justice Services, Personal Criminal History Record Review Program, http://criminaljustice.state.ny.us/ojis/recordreview.htm (last visited Nov. 20, 2007).

17. Bureau of Justice Statistics, Criminal Record Systems Statistics, http://www.ojp.gov/bjs/crs.htm#findings (last visited Nov. 20, 2007).

18. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat 1536 (1993) (codified as amended at 18 U.S.C. § 921). *See also* JAMES B. JACOBS, CAN GUN CONTROL WORK?, at ix–x (2002).

19. Brady Handgun Violence Prevention Act §103(b). *See* National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303 (Oct. 30, 1998) (codified at 28 C.F.R. pt. 25) (implementing the NICS pursuant to the Brady Law).

20. *See* Criminal Justice Information Services Division, Fed. Bureau of Investigation, National Instant Criminal Background Check System (NICS) Operational Report 2003–2004, http://www.fbi.gov/hq/cjisd/nics/index.htm (last visited Nov. 20, 2007) (reporting funds totaling nearly half a billion dollars being granted to states for improvement of their criminal record keeping systems) [hereinafter NICS Report].

automate and upgrade their criminal records systems.[21] The Bureau of Justice Statistics and the FBI encouraged states to maintain the accuracy and completeness of their criminal records by offering grants to states and monitoring their compliance.[22] By 1998, the states' criminal records infrastructure had been substantially upgraded and the NICS was operational.[23] It is estimated that the NICS processes about eight million firearm purchase background checks annually.[24]

The FBI's Interstate Identification Index (the III), which links federal and state criminal records systems,[25] became operational through the National Crime Information Center (NCIC)[26] in 1983.[27]

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21. *See* Bureau of Justice Statistics, National Criminal History Improvement Program (NCHIP), http://www.ojp.usdoj.gov/bjs/nchip.htm (last visited Nov. 20, 2007).

22. *See* 28 C.F.R. pt. 20 (2007) (Department of Justice regulations for auditing state criminal records systems). The purpose of these regulations is "to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of such information and to protect individual privacy." 28 C.F.R. § 20.1. *See also* NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 101, 122 Stat. 2559, 2562 (codified as amended at 18 U.S.C. § 922 note) (providing support to state and federal governments to ensure the accuracy of NICS information and to "work with States to encourage the development of computer systems, which would permit electronic notification to the Attorney General when—(i) a court order has been issued, lifted or otherwise removed by order of the court; or (ii) a person has been adjudicated as a mental defective or committed to a mental institution").

23. *See* NICS Report, *supra* note 20.

24. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 211485, PROGRAM REPORT: IMPROVING CRIMINAL HISTORY RECORDS FOR BACKGROUND CHECKS, 2005, at 3 (2006), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/ichrbc05.pdf ("The NICS is now supporting nearly 8 million checks annually at the presale stage of firearms purchases."). When a firearms manufacturer, dealer, or importer licensed by the federal government initiates a NICS background check, a name and descriptor search is conducted to identify any matching records in three national databases: the Interstate Identification Index (the "III"), the National Crime Information Center ("NCIC"), and the NICS Index. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2005, at 2 (2006), *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf. These three databases combined contain over fifty-five million criminal history records. *Id.* The most expansive, the III, contains over 46,087,000 records. *Id.* The NCIC, "contain[ing] information on protection orders, wanted persons, and others," includes over 3,238,000 records. *Id.* The NICS Index, which "contains records . . . pertaining to individuals *federally* prohibited [by the Brady Law] from the transfer of a firearm," has over 3,960,000 records. *Id.*

25. *See generally* NAT'L TASK FORCE TO THE U.S. ATT'Y GEN., NCJ-179358, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY (1999), *available at* http://www.search.org/files/pdf/III_Name_Check.pdf [hereinafter III REPORT] (providing an explanation of how criminal record information is stored in the III and how law enforcement officials are able to access the III in order to check a person's criminal history information).

26. The NCIC is "a national system of computers, communications lines, and personnel engaged in exchanging criminal justice information" and was chosen to oper-

States that participate in the III submit offender fingerprints electronically to the FBI's fingerprint storage database known as the Integrated Automated Fingerprint Identification System (IAFIS).[28] Every criminal record stored in the III corresponds to a set of fingerprints entered into IAFIS. The III enables the FBI to direct searchers to the states containing records on the subject of the search. For this reason, the III is called a "pointer system"—it tells law enforcement officials which states have criminal history record information on a particular subject and allows searchers to obtain this information directly from the state repository where the information is located.[29] When fully functional,[30] the III will make it unnecessary for the NCIC to hold any state criminal records. Instead, the III will maintain a database of offenders' identities (name, photo, fingerprint) and the states where their rap sheets[31] can be obtained, and the state repositories will hold the actual criminal records.

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ate the III because of its existing technological and communications capabilities. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-85-4, OBSERVATIONS ON THE FBI'S INTERSTATE IDENTIFICATION INDEX 2–3 (1984), *available at* http://archive.gao.gov/d6t1/125400.pdf [hereinafter GAO III REPORT]; Federation of American Scientists, National Crime Information Center (NCIC) – FBI Information Systems, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last visited Oct. 16, 2007). For a discussion of the NCIC and its databases, see *infra* Part III.

27. *See Central Statement*, NCIC 2000 NEWSLETTER (Fed. Bureau of Investigation), April–May 1996, *available at* http://permanent.access.gpo.gov/lps3213/2kv1n3.htm (describing how the III was added in the NCIC in 1983). *See also* GAO III REPORT, *supra* note 26, at 3 (describing the background of the III and how and when the NCIC began to manage it).

28. Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System (IAFIS), http://www.fbi.gov/hq/cjisd/iafis.htm (last visited Feb. 6, 2007). The IAFIS, "a national fingerprint and criminal history system," contains information "submitted voluntarily by state, local, and federal law enforcement agencies." *Id.*

29. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 15 (2006), *available at* http://www.usdoj.gov/olp/ag_bgchecks_report.pdf [hereinafter ATTORNEY GENERAL'S REPORT]; Jacobs, *supra* note 3, at 394–95.

30. The III is not complete, as some state records have not been included or updated and as a result may not meet the III standards. *See* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 16–17. Other records may not be included because of inconsistent state reporting requirements, poor fingerprint quality, or missing dispositions. *Id.* The III, however, is the "most comprehensive single source of criminal history information in the United States." *Id.*

31. "Rap" is an acronym for "record of arrest and prosecution." *See, e.g.*, Bureau of Justice Statistics, Summary of 2006 Awarded Activities, http://www.ojp.usdoj.gov/bjs/nchip2.htm (last visited Jan. 20, 2008). A rap sheet contains information on arrests, dispositions, and sentences. LEGAL ACTION CTR., HOW TO GET AND CLEAN UP YOUR NEW YORK STATE RAP SHEET 7 (7th ed. 2007), *available at* http://www.hirenetwork.org/pdfs/NYS_Rap_Sheet_Final.pdf.

B. Court Records

The federal, state, and local courts maintain records of everything that occurs before them.[32] A record is made when charges are brought against a defendant, when he appears in court, and when he files a motion or petition with the court. Court records have long been available for public inspection and copying at courthouses.[33] Until recently, however, an individual's criminal records were not easily retrievable because a searcher would not know which courts held the relevant records. Recent state-wide centralization and automation of court records systems has vastly increased record identification and accessibility.[34]

Court records can provide a tremendous amount of information. Criminal cases are initiated either by grand jury indictment or by a prosecutorial charging document referred to as an "information."[35] In some jurisdictions, charging documents provide a wealth of specific allegations about the defendant and his or her alleged crime.[36] At a minimum, these charging documents confirm that a specified individ-

32. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ-111458, PUBLIC ACCESS TO CRIMINAL HISTORY INFORMATION 3 (1988) ("[E]very court keeps a record, usually called a docket, of events occurring in that court. The docket includes records of arraignments, adjudications, sentences, and other judicial events. In some courts these records are indexed by the names of record subjects and are cumulative—that is, all the events in a given court, even events involving different cases, in which a particular individual participated can be obtained by searching under that individual's name . . . As a matter of constitutional right, statute, or court rule, dockets are open to public inspection in every state."). For the rule governing the maintenance of federal court records, see FED. R. CRIM. P. 55 ("The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry."); *see also* 28 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 655.02 (3d ed. 2007) ("In every criminal case the clerk maintains a docket in which a record is made of all action taken in the case . . . Magistrate judges' proceedings are recorded in a similar fashion.").

33. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (internal citations omitted).

34. In recent years, court records have become even more accessible due to the passage of federal and state "e-government acts" that make court records, including docket information, indictments, motions, pleas, trial testimony, appellate arguments, and opinions accessible via the internet. For a discussion of the federal e-government act, see *infra* notes 49–50 and accompanying text.

35. FED. R. CRIM. PRO. 7.

36. Federal indictments, some of which reach one hundred pages, can be very detailed. *See, e.g.*, Indictment, U.S. v. Roemmele, 04-60206-Cr-Cohn (S.D. Fl. 2006), *available at* www.usdoj.gov/usao/fls/VictimWitness/USvRoemmele/20040824.Indictment.pdf (setting forth allegations of each defendant's role in a complex fraud scheme).

ual is the subject of particular criminal charges,[37] which may be enough to adversely affect current and future opportunities.

Of course, even more information can be obtained from motions, plea allocutions, trial transcripts, and judicial rulings. Copies of court records are available for inspection and copying by the public.[38] Transcripts of court proceedings, when they exist, are stored at the courthouse for at least ten years.[39] Until recently, it would have taken considerable effort for an ordinary citizen to locate a particular criminal record among all those stored in a courthouse. However, as records become computerized they easily are able to be searched and accessed remotely or through an on-site courthouse computer terminal.[40]

The state offices of court administration collect and store these documents in centralized criminal records systems. For example, New York State's Office of Court Administration's Criminal History Records Search (CHRS) accesses a database of all criminal cases processed through New York State courts.[41] This system makes it possible for criminal court judges to retrieve data from prior cases throughout the state involving any defendant whose case they are considering at the pre-trial, trial, or sentencing stage. Direct access to CHRS is password restricted,[42] but the New York State Office of Court Administration, like many similar agencies in other states, sells individual criminal history records to the public.[43]

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37. *See id.* at 3–4.

38. 28 U.S.C. § 753(b). *See, e.g.*, S.D.N.Y., Court Reporting, http://www1.nysd.uscourts.gov/court_reporting.php (last visited Nov. 12, 2007); *see also* Memorandum from Leonidas Ralph Mecham, Director, Admin. Office of the U.S. Courts to Chief Judges, et al. (Oct. 22, 2002), *available at* http://www.pawb.uscourts.gov/pdfs/transcripts.pdf.

39. *See* 28 U.S.C. § 753(b).

40. *See, e.g.*, Ashland County, Ohio, Common Pleas Court, PressToStart, http://www.ashlandcountycpcourt.org (last visited Nov. 28, 2007) (electronic remote access to Ashland County's court records).

41. *See* N.Y. State Unified Court System, Criminal History Records Search, http://www.courts.state.ny.us/apps/chrs (last visited Nov. 24, 2007).

42. *See* Division of Administrative Services, Criminal History Record Search, Online – Direct Access: The Process, https://iapps.courts.state.ny.us/chrs/htrml/faq.pdf (last visited Nov. 24, 2007); N.Y. State Unified Court System, Criminal History Records Search, Online Direct Access, http://www.courts.state.ny.us/apps/chrs/onlinedirectaccess.shtml (last visited Feb. 20, 2008).

43. For $52, New York's Office of Court Administration (OCA) offers via an online service any requester a copy of any person's New York State criminal record. *See* N.Y. State Unified Court System, Criminal History Records Search, *supra* note 41. One information services provider tried unsuccessfully, via a state Freedom of Information Act request, to obtain OCA's entire database of criminal records for free on the ground that it was public information. *See* Michael A. Riccardi, *Office of*

Similar to the New York system, the Kansas Bureau of Investigation launched Kansas' online criminal records database in 2004.[44] This database is available to the general public and allows a searcher to retrieve any individual's criminal history record simply by entering the name and birth date of the search subject.[45] These criminal histories include convictions for offenses classified under Kansas state law as felonies and as class A, class B, or certain types of class C misdemeanors.[46] The criminal histories also include records of arrests that occurred less than a year before, which are missing disposition information.[47] There were 3000 public searches of this database in the first month of the website's availability.[48]

The federal government also has taken steps to make more records electronically available. The 2002 E-Government Act has made more federal court records retrievable through computer search.[49] The Act requires federal agencies and federal courts to make their records available electronically either by remote access or by on-site computer terminals.[50]

C. Commercial Information Vendors

The last two decades have seen the emergence of a thriving private sector industry that provides criminal background checking services to clients such as employers, landlords, insurance companies, voluntary associations and even some government agencies.[51] Some companies have constructed their own databases by purchasing crimi-

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Court Administration Exempt from FOIL Request, Rules Manhattan Justice, N.Y. L.J., Dec. 12, 2000, *available at* http://www.courtaccess.org/states/ny/documents/article_ny_oca.htm.

44. *Kansas Criminal History Records Now Available Online at www.accessKansas.org,* BUS. WIRE, May 12, 2004, *available at* http://findarticles.com/p/articles/mi_mOEIN/is_2004_May_12/ai_n6023367. *See also* Kansas Bureau of Investigation, *supra* note 14.

45. *Kansas Criminal History Records Now Available Online*, *supra* note 44. A $17.50 fee is required to obtain an individual's criminal record. *Id.*

46. Kansas Bureau of Investigation, Requesting Someone Else's Criminal History Record, http://www.accesskansas.org/kbi/criminalhistory/request_public.shtml (last visited Dec. 27, 2007).

47. *Id.*

48. *Kansas Criminal History Records Now Available Online*, *supra* note 44.

49. E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913–14 (codified as amended 44 U.S.C. § 3501 (2000)).

50. *Id.*

51. *See* SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS., NAT'L TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA 1 (2005), *available at* http://www.search.org/files/pdf/ReportofNTFCBA.pdf [hereinafter REPORT OF NTFCBA].

nal history records in bulk from courts and state record repositories.[52] For example, National Background Data (NBD), perhaps the "largest privately held criminal database of its kind," claimed as of spring 2003 to provide real-time access to more than 126 million records covering thirty-eight states.[53] Another vendor, ChoicePoint, claims to have in excess of seventeen billion public records, including more than ninety million criminal records.[54] ChoicePoint reported conducting approximately 3.3 million background investigations in 2002, the overwhelming majority of which included a criminal records search.[55] ChoicePoint, among other private information vendors, dispatches personnel or "runners" to the courts in jurisdictions where the subject of a background search has lived.[56]

Many private information services companies prominently advertise on the World Wide Web. An internet search for "criminal records" yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. These companies are somewhat regulated by the federal Fair Credit Reporting Act (FCRA).[57] State laws, however, do not

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52. Leslie Walker, *Police Records For Anyone's Viewing Pleasure*, WASH. POST, May 23, 2002, at E1, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A59991-2002May22.

53. National Background Data – Background Screening Solutions, http://www.nationalbackgrounddata.com (last visited Dec. 27, 2007). *See* REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION, *infra* note 54, at 9.

54. *See* SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO & STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE INFORMATION 9 (2005), *available at* http://www.search.org/files/pdf/RNTFCSCJRI.pdf.

55. *Id.* at 7.

56. *Id.* at 9.

57. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000) (establishing "reasonable procedures" for consumer reporting agencies, in order to make credit reporting fair and equitable to the consumer, "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"). The FCRA regulates consumer reporting agencies' (CRAs) dissemination of criminal history information. *See id.* § 1681(b). Criminal records vendors, like E-Verifile, who collect criminal record information from publicly available sources, and criminal information brokers, like ChoicePoint, who buy criminal records from vendors and sell them to end users, are both covered under the FCRA as CRAs. *See* 15 U.S.C. § 1681a(f) (defining CRAs); *see also* E-Verifile, Criminal Records, http://www.everifile.com/risk_assessment/criminal_records.html (last visited Jan. 20, 2008); Duane D. Stanford, *All Our Lives Are on File for Sale*, ATLANTA J. CONST., Mar. 21, 2004, at A1. Neither the FBI nor state or local agencies providing criminal records to employers are considered CRAs because these agencies often fulfill federal and state mandates to provide the public with this information. *See* Letter from Clarke W. Brinckerhoff, Attorney, Division of Credit Practices, Federal Trade Commission, to Susan Boesen Copple, Iowa Ass'n of Homes & Servs. for the Aging (June 10, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/copple.htm ("[A] state agency . . . that provides information such as crim-

regulate these companies directly, but do prohibit employers from using criminal record information in employment decisions.[58]

II.
Increasing Scope of Criminal Records

A. Non-Serious Crimes

Under current regulations, the FBI does not accept fingerprint or arrest information for "non-serious" offenses, "such as drunkenness, vagrancy, disturbing the peace, curfew violations, loitering, false fire alarms, non-specific charges of suspicion or investigation, and traffic violations."[59] Some states do not fingerprint or create criminal records for persons arrested for non-serious offenses,[60] while other states do.[61] Though a state criminal records repository might have held a criminal record of an individual's non-serious offense, an out-

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inal records checks to further law enforcement or other policies mandated by the state legislature should not be considered a CRA."); Ollestad v. Kelley, 573 F.2d 1109, 1111 (9th Cir. 1978) (holding that the FBI is not considered a CRA for the purposes of the FCRA). FCRA regulations regarding criminal history record information offer very little protection for persons who have a criminal record. Reporting agencies may report any conviction regardless of when it occurred. *See* 15 U.S.C. §§ 1681c(a), (b). They may report arrests, criminal complaints, indictments, warrants, parole, and probationary sentences so long as these criminal justice contacts occurred within the past seven years. *Id.* § 1681c(a). The FCRA waives all time restrictions on reporting criminal history information for employment purposes if the individual's salary is $75,000 or more. *Id.* § 1681c(b). The FCRA does require reporting companies to verify the accuracy of information that relates to an indictment, arrest, or conviction within thirty days of disseminating the report. 15 U.S.C. § 1681d(d)(3).

58. Letter from the National Association of Professional Background Screeners to the U.S. Department of Justice 10–11 (Aug. 4, 2005), *available at* http://www.usdoj.gov/olp/pdf/0394_001.pdf. *See, e.g.*, N.Y. Exec. Law § 296(15) (Consol. 1995); N.Y. Correct. Law §§ 750–53 (Consol. 2005).

59. 28 C.F.R. § 20.32 (b) (2007). *See also* Tarlton v. Saxbe, 407 F. Supp. 1083, 1086–88 (D.D.C. 1976) (noting the FBI's policy of deleting non-serious offenses on a person's criminal record).

60. *See, e.g.*, N.Y. Crim. Proc. Law § 160.10 (McKinney 2004). *See also* Diane Cardwell, *City Challenged on Fingerprinting Protesters*, N.Y. Times, Oct. 5, 2004, at B3 (reporting that fingerprinting for minor offenses is illegal under New York law in most circumstances).

61. *See, e.g.*, Ohio Rev. Code Ann. § 109.60 (West 2002). *See also* Catherine Candinsky, *Teachers with Criminal Past Needn't Apply Even Minor Offenses Can Cost a Career, Board Says*, Columbus Dispatch, July 14, 1998, at 2C (describing how Ohio teachers are denied jobs because of the state's computerized fingerprint checks, which reveal they had committed minor offenses, such as public drunkenness).

of-state law enforcement agency or employer would not find out about it through a search of the NCIC.[62]

In September 2006, however, over the protests of many civil rights groups,[63] the FBI broke with this long-time policy, proposing to include in the NCIC all arrests, even those for non-serious and juvenile offenses.[64] When implemented, the FBI's proposal will increase the number of persons whose criminal records could be accessed via the III.[65]

The FBI offered two reasons for expanding the scope of criminal history records: (1) to create a more uniform national policy so that law enforcement agencies and employers in a state requesting an FBI criminal history search will receive the same information as law enforcement agencies and employers in the state where the criminal record originated; and (2) to provide public and private employers with valuable information on prospective employees.[66]

B. Storing and Reporting Juvenile Crimes

Historically, juvenile criminal records have been treated more confidentially than adult criminal records.[67] The desire to shield the young offender from the negative consequences of a criminal stigma was one of the basic rationales for "removing juveniles from the ordi-

62. *See* 28 C.F.R. § 20.32(b) (2007) ("These exclusions may not be applicable to criminal history records maintained in state criminal history record repositories . . . .").

63. *See* NATIONAL EMPLOYMENT LAW PROJECT, ET AL., PROPOSED REGULATION EXPANDING FBI RAP SHEETS TO INCLUDE "NON-SERIOUS" OFFENSES FOR EMPLOYMENT & LICENSING PURPOSES 1 (2006), *available at* http://www.nelp.org/docUploads/FBI%2DNSOComments%2Epdf) (joint comments opposing proposed FBI regulation submitted by several civil rights organizations, including the American Civil Liberties Union, the Brennan Center for Justice at NYU School of Law, the Mexican American Legal Defense & Education Fund, and the National Employment Law Project).

64. Inclusion of Nonserious Offense Identification Records, 71 Fed. Reg. 52,302 (proposed Sept. 5, 2006) (to be codified at 28 C.F.R. pt. 20). *See* discussion *infra* Part II.B for more detail regarding the inclusion of juvenile records in the NCIC.

65. *See supra* notes 25–29 and accompanying text for a discussion of the FBI's III system.

66. Inclusion of Nonserious Offense Identification Records, 71 Fed. Reg. at 52,303. For example, local governments may disqualify an applicant for a school bus driver position on account of prior traffic offenses. *Id.*

67. *See, e.g.*, Kent Marcus, Counselor to the Attorney General for Youth Violence, U.S. Dep't of Justice, Keynote Address at the Bureau of Justice Statistic's National Conference on Juvenile Justice Records (May 1997) *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NAT'L CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NONCRIMINAL JUSTICE USES 3 (1997), *available at* http://www.ojp.gov/bjs/pub/pdf/ncjjr.pdf.

nary criminal process."[68] Before 1992, juvenile court adjudications were not stored in the FBI's NCIC database.[69] In 1992, however, the FBI amended the rules and regulations governing the NCIC to allow for the inclusion of juvenile criminal history record information on the same basis as adult records.[70] Then, in September 2006, the FBI took another step toward erasing any special treatment of juvenile criminality by announcing its proposed policy on accepting information on non-serious offenses, including juvenile offenses.[71]

Once the proposed 2006 rule takes effect, juvenile arrestees who would not have had a federal criminal record under the old FBI policy will have one.[72] While the FBI will follow a state instruction to remove or seal records,[73] logistical difficulties make effective sealing problematic.[74] By the time the state has sealed a juvenile record and informed the FBI, the FBI and private information services companies may already have disseminated the record. Perhaps private companies could be required to implement governmental sealing decisions, but

68. *See* U.S. v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994) ("The purpose of the [Federal Juvenile Delinquency Act] is to 'remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.' ").

69. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 184793, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 1999, at Glossary 2 (2000) (defining juvenile justice records and providing information related to their storage and dissemination).

70. 28 C.F.R. § 20.32(b) (1993). The previous regulation instructed state criminal records repositories to send the FBI arrest information for "serious and/or significant" offenses. 28 C.F.R. § 20.32(b) (1984). On July 15, 1992, the Department of Justice amended Section 20.32 to include these juvenile offenses. *See* Authorization of Inclusion of Juvenile Records in the FBI Criminal History Information System, 57 Fed. Reg. 31,315 (July 15, 1992) (to be codified at 28 C.F.R. pt. 20). The new regulation, which is still in place today, requests submission of "serious and/or significant adult and *juvenile* offenses." 28 C.F.R. § 20.32 (b) (2007) (emphasis added).

71. *See* Inclusion of Nonserious Offense Identification Records, 71 Fed. Reg. at 52,303.

72. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT 23–24 (1997).

73. Interview with Lisa Vincent, Unit Chief, VJIS/NICS, at SEARCH Conference, in San Francisco, Cal. (Jan. 23, 2008).

74. *See* Bernard Kogon & Donald L. Loughery, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. OF CRIM. L., CRIMINOLOGY & POLICE SCI. 378, 383–86 (1970). Sealing may fail to protect an individual from the problems associated with having a record because the record may be retrieved through secondary sources; sealing itself does not lift other limitations and lingering penalties; sealing encourages lying about not having a criminal record; and many individuals with a low socio-economic status and from minority groups do not have the ability or the resources to navigate the system of expungement and sealing. *Id.*

such a policy would be extremely difficult to implement even if it could survive constitutional attack.[75]

III.
Proliferation of Federal Criminal Records Databases

Federal criminal records databases rapidly proliferated and expanded with the advent of computer technology. In 1967, the FBI established the NCIC with five files or databases covering convicted persons, wanted persons, and various types of stolen property.[76] In 1971, the NCIC created the Computerized Criminal History program (CCH), using computers to store individual criminal history files.[77] Computer technology quickly facilitated the creation of new criminal databases. The FBI launched the Missing Persons File in 1975.[78] Subsequently, the FBI added the Interstate Identification Index and the U.S. Secret Service Protective File in 1983, the Foreign Fugitive File in 1987, the Violent Gang Members and Organizations File in 1994 (later expanded to include terrorists and terrorist organizations), the Deported Felon File in 1996, the Protection Order File in 1997, and the Immigration Violators File in 2003.[79] By 2007, the NCIC con-

75. In all likelihood, it would be unconstitutional under the First Amendment for a state to punish a private company or person for revealing a juvenile's criminal record. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (holding that under the First Amendment the State of West Virginia cannot punish a newspaper for publishing the name of a juvenile arrested for murder).

76. *See National Crime Information Center: 30 Years on the Beat*, Investigator, Dec. 1996–Jan. 1997, *available at* http://permanent.access.gpo.gov/lps3213/ncicinv.htm; Federation of American Scientists, National Crime Information Center (NCIC) – FBI Information Systems, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last visited Oct. 16, 2007). *See also* 28 C.F.R. § 20.32 (offenses to be included in the III system and the FIRS).

77. U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 187670, Use and Mgmt of Criminal History Record Information, A Comprehensive Report, 2001 Update 27 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf.

78. *See National Crime Information Center: 30 Years on the Beat*, Investigator, *supra* note 76.

79. *Id.*; *Central Statement*, NCIC 2000 Newsletter (Fed. Bureau of Investigation), April–May 1996, *available at* http://permanent.access.gpo.gov/lps3213/2kv1n3.htm; *Vulnerabilities in the U.S. Passport System Can Be Exploited By Criminals and Terrorists: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 69–74 (2005) (statement of Thomas E. Bush III, Assistant Director, Criminal Justice Information Services Division) [hereinafter *Homeland Security Hearings*]. The Deported Felon File is now a category of records within the Immigration Violator File. *Id.*

tained eighteen databases,[80] several of which did not depend upon a previous conviction or even on an arrest.[81]

The repercussions, however, for an individual listed in one of these quasi-criminal databases may be the same or similar to the consequences of having a traditional criminal record. In particular, the Immigration Violators File, Violent Gang and Terrorist File, and Protection Order File, each discussed below, demonstrate the expanding scope of information included in the federal criminal records system.

A. Immigration Violators File

The inclusion of the Immigration Violators File, which replaced the Deported Felon File, constituted a major expansion of the federal criminal records system because it brought individuals accused of violating certain administrative regulations into the FBI's criminal records database.[82] In addition to the names and fingerprints of persons previously convicted of a felony or misdemeanor and deported,[83] the File also includes information related to those in the country subject to a final deportation, exclusion, or removal order (also known as absconders), those who have allegedly violated a requirement of the National Security Entry Exit Registration System (NSEERS),[84] and

80. Fed. Bureau of Investigation, CJIS Division, Nat'l Crime Information Ctr. (NCIC), What is the NCIC?, http://www.fbi.gov/hq/cjisd/ncic_brochure.htm (last visited Dec. 16, 2007).

81. For example, the Missing Persons File, which was created to help law enforcement agencies locate certain individuals, includes individuals who are not wanted for any criminal charges. *Central Statement*, NCIC 2000 NEWSLETTER, *supra* note 79. Likewise, the Unidentified Persons File and the U.S. Secret Service Protection File are not based upon convictions or arrests. *Id.*

82. Petitioners in a recent case, *Nat'l Council of La Raza v. Gonzales*, noted the NCIC's authorizing statute "limits the FBI's power to collect and exchange criminal justice information to narrowly delineated categories" and "*civil* immigration records and administrative warrants . . . are not 'crime records' under the statute. In addition, the individuals who are the subjects of those records have not been charged or convicted criminally, and are not subject to criminal warrants. These individuals are not 'criminals' merely because the defendants so label them." Brief of Petitioner-Plaintiff at 2, Nat'l Council of La Raza v. Gonzales, 468 F. Supp. 2d 429 (E.D.N.Y. 2007) (No. 03-CV-6324). *See also* Testimony of Michael D. Kilpatrick, Assistant Director in Charge, Criminal Justice Information Services Division of the FBI's National Crime Information Center, http://www.fbi.gov/congress/congress03/ncic111303.htm (last visited Oct. 16, 2007).

83. *See* Mike J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095–96 (2004) (referencing requirements of 8 U.S.C. § 1252c(b) (2000)).

84. NCIC 2000 OPERATING MANUAL, Immigration Violator File, https://olets-info.olets.state.ok.us/cjismanuals/pdf/Immigration_violator.htm (last visited Oct. 16, 2007). A legal challenge against inclusion of the Absconders and NSEERS violators database in the NCIC was dismissed due to lack of standing. *See* Nat'l Council of La

foreign students who have violated visa requirements.[85] As such, this File includes persons who have violated immigration regulations, but not criminal laws.

The inclusion of the Immigration Violators File in the NCIC encourages state and local enforcement of immigration laws. If a local or state police officer anywhere in the country stops a motorist for speeding, the officer may, using the motorist's name or driver's license, electronically search the NCIC database.[86] The police officer will be informed immediately if the driver is wanted for an immigration violation.[87] If so, there is likely to be an outstanding immigration warrant authorizing the individual's arrest.[88] The police officer who initiated the search is instructed to contact the Department of Homeland Security's (DHS) Law Enforcement Support Center for confirmation.[89] If confirmed, the officer is usually told to arrest or detain the person until DHS can take custody of him or her.[90]

B. Violent Gang and Terrorist File

In the 1990s the Department of Justice (DOJ) recognized violent gangs as a major national crime and security problem.[91] In 1995, the FBI added a Violent Gang File to the NCIC with a three-fold purpose: (1) alerting law enforcement officers to the potential danger posed by violent gang members; (2) promoting the interagency exchange of information about these organizations; and (3) identifying a point of contact for agencies seeking information about the groups or individuals.[92] As two FBI agents explained:

Raza v. Gonzales, 468 F. Supp. 2d 429, 444–45 (E.D.N.Y. 2007) (denying standing because injury remains speculative).

85. Wishnie, *supra* note 83, at 1097.

86. Muzaffar A. Chishti, *Enforcing Immigration Rules: Making the Right Choices*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 118 (2007).

87. *Id.*

88. *See Nat'l Council of La Raza*, 468 F. Supp. 2d at 433–34.

89. *Id.*

90. *Id.* While many state and local police officials are opposed to being drawn into enforcing the federal immigration laws, some police departments are eager to do so. *See, e.g.*, Nina Bernstein, *Police Report Noncitizens to U.S., Official Says*, N.Y. TIMES, Apr. 23, 2005, at B3 ("New York police officers routinely inform federal immigration authorities whenever they arrest a noncitizen . . . ."). *See also* Daniel Richman, *The Right Fight*, BOSTON REVIEW, Dec. 2004–Jan. 2005, *available at* http://bostonreview.net/BR29.6/richman.html (explaining local police attitudes toward immigration enforcement).

91. *See* OFFICE OF JUV. JUSTICE & DELINQ. PREVENTION, U.S. DEP'T OF JUSTICE, GANG SUPPRESSION AND INTERVENTION: PROBLEM AND RESPONSE, RESEARCH SUMMARY 1–7 (1994).

92. Peter F. Episcopo & Darrin L. Moor, *Focus on Information Resources: Violent Gang and Terrorist Organizations File*, FBI LAW ENFORCEMENT BULL. (Fed. Bureau

> [The File] acts as a pointer system, identifying known members of violent gangs and terrorist organizations and facilitating the exchange of information. By alerting law enforcement officers to potentially dangerous subjects, the [File] enhances their safety. In short, the [File] provides every U.S. law enforcement agency access to valuable information on a growing crime problem that threatens the safety of officers and citizens in an increasing number of communities.[93]

After the attacks of September 11, 2001, the DOJ and the DHS added suspected terrorists to the Violent Gang File, changing the database's name to the Violent Gang and Terrorist Organizations File (VGTOF).[94] In expanding the scope of the database to include the names and identifiers of domestic and international terrorist suspects, the government added a fourth purpose—to improve national security by enabling local and state police to identify terrorist suspects when they are stopped for routine traffic violations, arrested for other minor offenses, or used as an investigative tool whenever an individual is identified during an investigation.[95] Once that identification is made, presumably after an NCIC database check, the officer is instructed to contact the FBI for additional information on the subject.[96]

State and local law enforcement officers may also enter a name in the VGTOF database if a person admits membership in the gang or meets any two of the following criteria:

> a. Has been identified by an individual of proven reliability as a group member[;]
> b. Has been identified by an individual of unknown reliability as a group member and that information has been corroborated in significant respects[;]
> c. Has been observed by members of the entering agency to frequent a known group's area, associate with known group members, and/or affect the group's style of dress, tattoos, hand signals, or symbols[;]
> d. Has been arrested on more than one occasion with known group members for offenses consistent with group activity[; or]

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of Investigation), Oct. 1996, *available at* http://www.fbi.gov/publications/leb/1996/oct965.txt.

93. *Id.*

94. *See* Ann Davis, *Data Collection Is Up Sharply Following 9/11*, WALL ST. J., May 22, 2003, at B1.

95. *Homeland Security Hearings*, *supra* note 79, at 72.

96. *Id.*

e. Has admitted membership in the identified group at any time other than arrest or incarceration.[97]

These criteria similarly apply to alleged members of terrorist groups.[98] Thus, a suspected gang member or terrorist's name can be entered into the VGTOF despite having neither a criminal conviction nor an arrest.

Inclusion in the database as a terrorist suspect has dramatic consequences, especially since the Bush administration's creation of the Terrorist Screening Center (TSC) in December 2003.[99] The TSC manages a consolidated watch list containing the names of known and suspected terrorists.[100] Created at President Bush's direction and run by the FBI and the DHS,[101] the TSC watch list consolidates several different government terrorist suspect databases including the Transportation Security Administration's "No Fly List"[102] and the FBI's VGTOF file.[103] The watch list now contains more than 720,000 names; more than quadruple the number in 2004 when the list was created, a growth rate of more than 20,000 names per month.[104] The Department of State consular officers and Customs and Border Protection officers must check the watch lists in order to ensure that known or suspected terrorists do not enter the United States.[105] Police officers also have access to the TSC because all of the names on the watch list are listed in the VGTOF, which is accessible via a NCIC criminal record check.[106] If a police officer hits the name of a person

97. PEGGY A. LAUTENSCHLAGER, ATT'Y GEN., WIS. DEP'T OF JUST., TIME SYSTEM MANUAL 285–86, *available at* http://www.doj.state.wi.us/dles/cibmanuals/files/TIME/PDF/Time.pdf. *See also* Memorandum from Richard A. Weldon, FBI/CJIS Global Initiatives Unit on Violent Gang and Terrorist Organization File Entry Criteria Code (ECR) Change, *available at* http://www.acjic.alabama.gov/documents/violent_gang.pdf (describing VGTOF codes pertaining to gang characteristics).

98. NCIC 2000, OPERATION MANUAL – VIOLENT GANG AND TERRORIST ORGANIZATIONS FILE 23 (1999), *available at* http://www.statepatrol.ohio.gov/operationalunits/otis/ncic2000/VGTOF.pdf.

99. Ellen Nakashima, *Terrorism Watch List Is Faulted For Errors*, WASH. POST, Sept. 7, 2007, at A12.

100. U.S. GOV'T. ACCOUNTABILITY OFFICE , GAO-06-1031, TERRORIST WATCH LIST SCREENING: EFFORTS TO HELP REDUCE ADVERSE EFFECTS ON THE PUBLIC 1 (2006) [hereinafter GAO REPORT – TERRORIST WATCH LIST].

101. Nakashima, *supra* note 99.

102. The Transportation Security Administration prohibits persons on the No Fly List from boarding an aircraft bound for, or departing from the United States. GAO REPORT – TERRORIST WATCH LIST, *supra* note 100, at 1 n.1.

103. GAO REPORT – TERRORIST WATCH LIST, *supra* note 100, at 8.

104. Nakashima, *supra* note 99.

105. GAO REPORT – TERRORIST WATCH LIST, *supra* note 100, at 1–2.

106. *Homeland Security Hearings*, *supra* note 79, at 72.

on the watch list, the NCIC database instructs him or her to contact the TSC for further information about the potential terrorist suspect.[107]

TSC's watch list identifies persons on the basis of name.[108] Misidentifications, however, of the thousands of potential matches sent to the center for further research occurred about half the time,[109] leading to questioning, searches, and travel delays.[110] As a result, the TSC has created "interagency working groups" and "quality-assurance initiatives" to reduce the high percentage of misidentifications.[111]

State and local law enforcement agencies often maintain their own databases to track and target street gangs.[112] Data entry criteria largely mirror VGTOF requirements, focusing on factors such as self-admission, association with gang members, and use of gang symbols and tattoos.[113] The federal government is planning to use information from these databases to support a new National Gang Intelligence Center that collects and disseminates gang information.[114]

The consequences of inclusion in federal or state databases can extend beyond prosecution and conviction, as police officers may notify school officials and prospective employers of an alleged gang member's status.[115] Civil libertarians claim the VGTOF and state databases unfairly discriminate against racial minorities and stigmatize youths without due process.[116] Among other serious ramifications, persons included in the VGTOF may be treated more severely at every discretionary point in the criminal justice process. For example, if a police officer stops an individual for a traffic violation, initiates an NCIC background check, and receives information that the individual

107. *Id.*; Leonard C. Boyle, *The U.S. Terrorist Screening Center: Connecting the Dots for Law Enforcement Agencies at All Levels*, POLICE CHIEF, Oct. 2007, *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1291&issue_id=102007.

108. GAO REPORT – TERRORIST WATCH LIST, *supra* note 100, at 1.

109. *Id.* at 4.

110. *Id.* at 4.

111. *See id.* at 5.

112. CHARLES M. KATZ & VINCENT J. WEBB, POLICING GANGS IN AMERICA 218–21 (2006) (discussing the use of gang databases by police departments in Arizona, California, Nevada, and New Mexico).

113. Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQUENCY 485, 496 (2003).

114. Wilson P. Dizzard, *FBI Plans a Database System to Focus on Gangs*, GOV'T COMPUTER NEWS, July 23, 2007, *available at* http://www.gcn.com/cgi-bin/udt/im.display.printable?client.id=gcn&story.id=44693.

115. Katz, *supra* note 113, at 508–09.

116. Loren Sigel, *Gangs and the Law*, *in* GANGS AND SOCIETY: ALTERNATIVE PERSPECTIVES 213, 223–26 (Louis Kontos et al. eds., 2003).

is listed as a member of a violent street gang, the officer is more likely to conduct a search of the individual. If drugs or other contraband are found, the individual will face serious consequences, particularly if charged in federal court.[117] Even if the individual is not then charged with a crime, information about the traffic stop may be turned over to a gang task force, who may subsequently arrest the individual.[118]

C. Protection Order File

The Protection Order File (POF), added to the NCIC in 1997,[119] is a database of state-court protection orders that prohibit violent or threatening acts, harassment, and contact, communication, or physical proximity to the beneficiary of the protection order ("the protected person").[120] The POF database was included in the NCIC to enable police officers to verify and enforce court-ordered protection orders issued in other states.[121] Arguably, law enforcement agencies' access to other states' protection orders will result in greater safety for protected persons, particularly domestic violence victims whose abusers pursue them across state lines. It will also enable the police to verify protection orders that prohibit their subjects from possessing firearms and should deter licensed firearms dealers from selling guns to the subjects of such orders.[122]

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117. *See* Memorandum from John Ashcroft, Att'y Gen., Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (making it the policy of the DOJ that federal prosecutors charge the "most serious, readily provable offense").

118. Over the past decade, local, state, and the federal governments have assigned high priority to combating gangs; some have created gang task forces. *See, e.g.*, Pasadena Police, Gang Task Force, http://www.ci.pasadena.tx.us/police/operations/patrol/gangs/gtf.htm (last visited Nov. 11, 2007) (exemplifying a local government gang task force); Josh Hafenbrack, *New Fla. Task Force Targets Gang Violence*, SUN-SENTINEL, Oct. 26, 2007, at 10B (describing state-wide gang policies); Fed. Bureau of Investigation, How We're Ganging Up On MS-13 and What You Can Do to Help, http://www.fbi.gov/page2/july05/ms071305.htm (last visited Nov. 11, 2007) (describing how at the federal level, a gang task force focuses on eliminating the Mara Salvatrucha gang (MS-13)). For more information on the MS-13 gang, see *infra* note 141 and accompanying text.

119. *Central Statement*, NCIC 2000 NEWSLETTER (Fed. Bureau of Investigation), April–May 1996, *available at* http://permanent.access.gpo.gov/lps3213/2kv1n3.htm.

120. *Id. See also* NCIC 2000, OPERATION MANUAL – PROTECTION ORDER FILE 1 (1999), *available at* http://www.statepatrol.ohio.gov/operationalunits/otis/ncic2000/ProtORdr.pdf.

121. U.S. GEN. ACCOUNTING OFFICE, GAO-04-364, NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM: FEDERAL GRANTS HAVE CONTRIBUTED TO PROGRESS 35 (2004), *available at* http://www.gao.gov/new.items/d04364.pdf [hereinafter GAO NCHIP].

122. *See id.* at 35 (stating a purpose of the POF is to "den[y] . . . firearms transfers to individuals who are the subjects of protection orders); *see also* Brady Handgun Vio-

The POF's addition to the NCIC constitutes an expansion of the criminal records database because protection orders are not considered criminal records. In fact, some protection orders are issued in civil and family courts.[123] To avoid undue harassment by local police, the FBI issues a warning every time a police officer receives a hit from the Protection Order File[124] stating, "WARNING - THE FOLLOWING IS AN NCIC PROTECTION ORDER RECORD. DO NOT SEARCH, DETAIN, OR ARREST BASED SOLELY ON THIS RECORD. CONTACT ENTERING AGENCY TO CONFIRM STATUS AND TERMS OF PROTECTION ORDER."[125] Unfortunately, there is no guarantee that this warning will always be heeded.

In order to ensure that the POF contains up-to-date records, the FBI requires submitting authorities to validate their records.[126] Upon request, the submitting agency must confirm that it has reviewed the information contained in the protection order record for accuracy and completeness.[127] If the submitting agency does not comply with the FBI's validation request within thirty days, the FBI "retires" the non-complying file from the database.[128] While this affords some measure of quality control, it is by no means infallible. For one thing, the FBI only makes validation requests each month for a small sample of cases in the File.[129] Moreover, a cleared or expired protection order record remains in the NCIC system for the remainder of that year plus five additional years.[130] This may subject a person to unfair treatment long after the protection order against him or her has been invalidated.

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lence Prevention Act, Pub. L. No. 103-159, §103(b), 107 Stat. 1536, 1541 (1993) (codified as amended at 18 U.S.C. § 922) (establishing a "national instant criminal background check system" to determine the eligibility of prospective firearms purchasers).

123. NCIC 2000, OPERATING MANUAL – PROTECTION ORDER FILE, *supra* note 120, at 1; *see also* Womenslaw.com, How to Get an Order of Protection, http://www.womenslaw.org/NY/NY_how_to.htm (last visited Feb. 9, 2008) (describing the criminal and family court protection orders in the state of New York). However, a *violation* of a protection order, regardless of which court issued the order, may in some jurisdictions constitute a criminally prosecutable contempt of court. *See, e.g.*, People v. Hadley, 658 N.Y.S.2d 814, 815, 819 (N.Y. Crim. Ct. 1997) (finding that violating a protection order may support a charge of criminal contempt).

124. NCIC 2000, OPERATING MANUAL – PROTECTION ORDER FILE, *supra* note 120, at 27.

125. *Id.*

126. NCIC 2000, OPERATING MANUAL – INTRODUCTION 54 (1999), *available at* http://www.statepatrol.ohio.gov/operationalunits/otis/ncic2000/intro.pdf.

127. *Id.* at 57.

128. NCIC 2000, OPERATING MANUAL – PROTECTION ORDER FILE, *supra* note 120, at 4.

129. *Id.*

130. *Id.* § 1.4

IV.
Criminal Identification Databases

Identification information, like fingerprints or DNA, is not a criminal record. Therefore no criminal stigma attaches to the government's possession of these identifiers unless they link a suspect to a crime. The expansion of identification databases, which connects an individual's fingerprints to his or her criminal records, means that more individuals with a prior criminal record will be identified. As more non-criminal record searches are conducted in these identification databases (for job and housing applications, for example), more applicants will be identified as having a prior criminal record. Thus, the expansion of the identification system makes it harder for individuals to escape their past crimes and even their past arrests.

State and federal criminal records databases can be searched by name,[131] fingerprints, or DNA.[132] Name checks, however, present a much greater risk of false positives—that is, identifying a criminal record for a person who does not actually have one—and false negatives—not identifying a criminal record for a person who actually does have one.[133] The latter is a risk whenever the search subject has a common name.[134] Criminals also often use multiple names or aliases in order to escape outstanding warrants and to avoid connecting their name to a disreputable criminal past.[135] In order to remedy this problem, soft identifiers, including date of birth and Social Security number, help narrow the pool of potential matches.

Police can use fingerprints and DNA, both of which are permanent and distinct to each individual, to combat the use of aliases. Fingerprint and DNA databases have grown dramatically as more persons are arrested and information related to their identity is added to the system.[136] As the federal fingerprint and DNA databases, both dis-

131. A name search is often supplemented with additional identifying information like residence and date of birth .

132. *See* Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 1017 (2002) ("At present all states have established DNA databases . . . .").

133. *See* III Report, *supra* note 25, at 1–2.

134. *See id.*

135. *See* Ruth Elwood Martin et al., *Beware of Multiple Names in Database Linkage Research: Prevalence of Aliases in Female Prison Population*, BMJ, Aug. 6, 2005, at 335, 335–36, *available at* http://www.bmj.com/cgi/content/full/331/7512/335.

136. Since 1991 the number of fingerprints in the IAFIS system increased by 27%. E-mail from Billy Estok, CJIS Division, Fed. Bureau of Investigation, to James Jacobs (Feb. 26, 2008, 16:40:40 EST) (on file with the *New York University Journal of Legislation and Public Policy*) (stating how on July, 29 1999, there were 40,797,534 criminal subject prints in the database and then as of January 31, 2008, there were

cussed in more detail below, expand to include more records, the operational efficiency of the national criminal records system will improve.

A. Fingerprint Databases

Since 1999, it has been possible to submit, store, and retrieve fingerprints electronically through the FBI's Integrated Automated Fingerprint Identification System (IAFIS).[137] The FBI Criminal Justice Information Services (CJIS) Division maintains the IAFIS, as well as the Fingerprint Identification Records System (FIRS) and National Fingerprint File (NFF).[138] The FIRS database includes all fingerprints held by the FBI, both criminal and non-criminal.[139] The NFF includes fingerprints taken for criminal cases.[140] Recently, the NFF has ex-

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55,672,171 criminal subject prints in the database). *See also* LAB. SERV., FED. BUREAU OF INVESTIGATION, CODIS BROCHURE, *available at* www.fbi.gov/hq/lab/pdf/codisbrochure.pdf ("[T]he number of [DNA] profiles in NDIS has and will continue to dramatically increase resulting in a need to re-architect the CODIS software."); Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System (IAFIS), http://www.fbi.gov/hq/cjisd/iafis.htm (last visited Feb. 6, 2007). Vision 2015, California's new fingerprint system, provides a striking example of how dramatically fingerprints databases are growing and will likely grow in the future. For background information regarding the new system see Tony Doonan, Asst. Bureau Chief, Cal. Dep't of Justice, Bureau of Criminal Identification and Info., Presentation at SEARCH 2008 Winter Meeting: California Information Sharing Briefing (Jan. 23, 2008), *available at* http://www.search.org/about/membership/meetings.asp (follow the "California Information Sharing Briefing" hyperlink). This system will allow police officers in the field to fingerprint persons whom they cite and release without bringing them to the station. *Id.* Before this, those cited and released were fingerprinted only at jail. Now, police officers will be able to fingerprint those at the jail, as well as those persons cited and released in the field. As a result, it is estimated that the total number of fingerprints obtained in California will increase by 30%, assuming the individual was not already in the system. Telephone Interview with Tony Doonan, Asst. Bureau Chief, Cal. Dep't of Justice, Bureau of Criminal Identification and Info., in Sacramento, Cal. (Feb. 17, 2008).

137. Fed. Bureau of Investigation, CJIS Division, Integrated Automated Fingerprint Identification System (IAFIS), http://www.fbi.gov/hq/cjisd/iafis.htm (last visited Oct. 16, 2007).

138. *Id.*; Fed. Bureau of Investigation, Freedom of Information Act: Fingerprint Identification Records System, http://foia.fbi.gov/firs552.htm (last visited Jan. 20, 2008).

139. *Id.* (noting that FIRS "maintains identification and criminal history record information on individuals fingerprinted as a result of law enforcement action, federal employment or military service, and a limited number of persons fingerprinted for alien registration and naturalization purposes, and those desiring to have their fingerprints on record for personal identification purposes").

140. 28 C.F.R. § 20.3 (2007). The "National Fingerprint File or 'NFF' means a database of fingerprints, or other uniquely personal identifying information, relating to an arrested or charged individual maintained by the FBI to provide positive identification of record subjects indexed in the III System." § 20.3(o). "National Identification

panded across international borders. The FBI's Central American Fingerprint Exploitation Initiative[141] merged approximately 100,000 Central American criminal fingerprint records with the FBI's fingerprint database.[142]

B. DNA Databases

In order to identify individuals, forensic scientists also create a DNA profile of an individual (sometimes called a "DNA fingerprint") by scanning thirteen DNA regions from a biological sample.[143] There is an extremely small chance that any two people share the same DNA profile.[144] In the late 1980s, states first began collecting DNA from convicted sex offenders, inputting DNA profiles into a computer database that could be searched to solve crimes using DNA recovered from the crime scene.[145]

Index or 'NII' means an index maintained by the FBI consisting of names, identifying numbers, and other descriptive information relating to record subjects about whom there are criminal history records in the III System." § 20.3(p).

141. Fed. Bureau of Investigation, Violent Crime: Officials Discuss Fight Against Gangs, http://www.fbi.gov/page2/jan07/gangs011607.htm (last visited Oct. 17, 2007). This initiative was created in response to the crack down on the Mara Salvatrucha (MS-13) gang. *Id.* The MS-13 gang began in El Salvador and was incubated in California prisons. *See* Arian Campo-Flores & Andrew Romano, *The Most Violent Gang in America*, NEWSWEEK, Mar. 28, 2005, at 23. The FBI estimates that it has more than 10,000 members in "chapters" in thirty-three states. *Id.* MS-13 is known for being extremely violent. *Id.* Effective counter-measures against the gang are complicated by the fact that it functions in El Salvador, Honduras, and Mexico, as well as in the United States. *See id.* The desire to more effectively investigate, prosecute, and repress MS-13 led to the formation of the MS-13 National Gang Task Force and the Central American Fingerprint Exploitation Initiative. *See* U.S. Immigration and Customs Enforcement, Operation Community Shield, http://www.ice.gov/pi/investigations/comshield/ (last visited Nov. 11, 2007) (describing the MS-13 National Gang Task Force); Fed. Bureau of Investigation, Going Global on Gangs, http://www.fbi.gov/page2/oct07/ms13tag101007.htm (last visited Nov. 11, 2007) (describing the Central American Fingerprint Exploitation Initiative, which allows U.S. law enforcement agencies to find the real name of a person arrested in the United States in order to prosecute an immigration law violation or a criminal offense).

142. *See* Fed. Bureau of Investigation, Violent Crime: Officials Discuss Fight Against Gangs, *supra* note 141; Fed. Bureau of Investigation – About Us – Our Post 9/11 Transformation, Fighting Gang Violence, http://www.fbi.gov/aboutus/transformation/gangs.htm (last visited Oct. 17, 2007).

143. Human Genome Project Information, DNA Forensics, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited Oct. 23, 2007). *See generally* Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767 (1999) (providing background on and regulation of state DNA databanks).

144. Human Genome Project Information, DNA Forensics, *supra* note 143.

145. Federal Bureau of Investigation – Freedom of Information Privacy Act Privacy Impact Assessment – National DNA Index System, http://foia.fbi.gov/ndispia.htm (last visited Nov. 12, 2007); Hibbert, *supra* note 143, at 774 ("In 1989 . . . the Vir-

In 1990, the federal government became involved in DNA collection by establishing the Combined DNA Index System (CODIS), a software pilot project linking state DNA databases.[146] Federal government involvement increased in 1994 when Congress passed the DNA Identification Act formally authorizing the FBI to establish a national DNA index for law enforcement purposes.[147] In October 1998, the index—known as the National DNA Index System (NDIS)—became operational.[148] The CODIS software system enables matches with DNA profiles contained in the NDIS index, a national "system of DNA profile records" submitted by local, state, and federal law enforcement agencies.[149] When an investigator in State A has a DNA profile and is trying to identify it, the investigator can run the DNA profile through CODIS in order to learn whether any other state or federal DNA database contains a matching profile.[150] In 2000, Congress passed the DNA Backlog Elimination Act,[151] which requires DNA testing for persons convicted of certain federal

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ginia General Assembly became the first American legislature to pass laws that required certain classes of offenders to submit DNA samples for inclusion in a DNA databank.").

146. LAB. SERV., FED. BUREAU OF INVESTIGATION, CODIS BROCHURE, *supra* note 136. *See also* Fed. Bureau of Investigation, Privacy Impact Assessment: National DNA Index System, http://foia.fbi.gov/ndispia.htm (last visited Nov. 12, 2007).

147. DNA Identification Act of 1994, Pub. L. No. 103-322, 108 Stat. 2065 (codified as amended at 42 U.S.C. §§ 14131–34 (2000)). *See also* Fed. Bureau of Investigation, Privacy Impact Assessment: National DNA Index System, *supra* note 146.

148. Press Release, Fed. Bureau of Investigation, National DNA Index System Reaches 1,000,000 Profiles (June 14, 2002), *available at* http://www.fbi.gov/pressrel/pressrel02/ndis061402.htm.

149. Fed. Bureau of Investigation, Privacy Impact Assessment: National DNA Index System, *supra* note 146; President's DNA Initiative, What is CODIS?, http://www.dna.gov/uses/solving-crimes/cold_cases/howdatabasesaid/codis/ (last visited Feb. 10, 2007). Each state has some discretion with respect to what offenses warrant inclusion of a DNA profile in the NDIS and searchability through CODIS. President's DNA Initiative, How Does CODIS Work?, http://www.dna.gov/uses/solving-crimes/cold_cases/howdatabasesaid/howcodisworks/ (last visited Feb. 10, 2007) ("Each State has different 'qualifying offenses' for which persons convicted of them must submit a biological sample for inclusion in the DNA database."); *see also* Fed. Bureau of Investigation, Privacy Impact Assessment: National DNA Index System, *supra* note 146.

150. *See* President's DNA Initiative, How Does CODIS Work?, http://www.dna.gov/uses/solving-crimes/cold_cases/howdatabasesaid/howcodisworks/ (last visited Nov. 24, 2007). A match in the database, or an "offender hit," provides an investigator with probable cause to take a new DNA sample from the suspect prior to an arrest. *Id.*

151. *See* DNA Analysis Backlog Elimination Act, Pub. L. 106-546, 114 Stat. 2726 (2000) (codified as amended at 42 U.S.C. § 14135).

crimes[152] and provides additional funding to support state and local law enforcement efforts to collect DNA samples from persons convicted of violent sex offenses.[153]

Recent legislation and policies have expanded the categories of people required to submit a DNA sample to federal authorities. For example, the January 2006, renewal of the Violence Against Women Act (VAWA)[154] authorizes the Attorney General to collect DNA samples from all persons arrested or detained under federal authority.[155] Non-U.S. citizens or permanent residents detained for immigration law violations may also be required to provide a DNA sample.[156] Given that 250,000 persons are arrested under federal law each year and that 1.3 million persons are detained for possible immigration violations, NDIS will certainly grow in the number of DNA profiles it holds.[157]

States also increasingly require more individuals to provide a DNA sample. Forty-four states have expanded DNA collection beyond violent and sex offenders to include all convicted felons.[158] At least eleven states now require arrestees to provide DNA samples.[159] For example, California allows DNA samples to be taken from all adults arrested for specific felonies, including sexual assault and murder; in 2009, the provision will expand to authorize DNA sampling from anyone arrested for any felony, even without a charge or conviction.[160]

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152. *Id.* § 3, 114 Stat. at 2728. The Act has withstood constitutional scrutiny. *See* United States v. Kincade (9th Cir. 2004) (holding the Act's requirement of mandatory DNA testing for persons convicted of certain federal crimes reasonable under Fourth Amendment analysis).

153. *See id.* § 2, 114 Stat. at 2726–28.

154. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter VAWA].

155. VAWA § 1004, 119 Stat. at 3085. *See also* JENNY RUSHLOW, COUNCIL FOR RESPONSIBLE GENETICS, RAPID DNA DATABASE EXPANSION AND DISPARATE MINORITY IMPACT 5 (2007), *available at* http://www.gene-watch.org/DNADatabases/RushlowReport.pdf (describing how new VAWA amendments permit the federal government to collect DNA samples from all persons arrested for federal offenses).

156. *See* VAWA § 1004, 119 Stat. at 3085.

157. RUSHLOW, *supra* note 155, at 5.

158. National Conference of State Legislatures, State Laws on DNA Databanks, Other Qualifying Offenses, Others Who Must Provide Sample: September 2007, http://www.ncsl.org/programs/cj/dnadatabanks.htm (last visited Feb. 10, 2007).

159. *Id.*

160. CAL. PENAL CODE § 295 (West 2008); *see also* Julia Scheeres, *Rough Reception for DNA Law*, WIRED, Nov. 27, 2004, http://www.wired.com/politics/law/news/2004/11/65744.

As of June 2001, there were over 600,000 convicted offender DNA profiles in NDIS and 26,000 forensic profiles based on DNA taken from crime scenes.[161] By October 2007, the numbers had mushroomed to over five million convicted offender profiles and approximately 195,000 forensic profiles.[162] A DNA identification system originally designed to identify sex offenders is rapidly evolving into an all-purpose identification system, similar to the fingerprints database.[163]

V.
Proliferation of Access to Criminal Records

In addition to the growth in type and volume of criminal records, access to these records has also expanded dramatically. Criminal records are not only more easily searched and retrieved by local, state, and federal law enforcement officers and personnel, they are also more available. Indeed, for sex offenders in particular, significant criminal and personal information is now available for free online as a result of the spread of Megan's Laws and the Adam Walsh Act. Further, the confidentiality of individual criminal history records has been seriously eroded with the passage of laws enabling or requiring federal-initiated background checks by non-criminal justice purposes.

A. State Authorized Criminal Background Checks

State repositories make criminal records available to state and local police, probation, corrections, and other criminal justice personnel, as well as to some employers and voluntary associations.[164]

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161. *How Effectively Are State and Federal Agencies Working Together to Implement the Use of New DNA Technologies?: Hearing Before the Subcomm. on Government Efficiency, Financial Management and Intergovernmental Relations of the H. Comm. on Government Reform*, 107th Cong. 51 (2002) (statement of Dwight E. Abrams, Deputy Assistant Director, Laboratory Division, Fed. Bureau of Investigation), *available at* http://www.fbi.gov/congress/congress01/dwight061201.htm.

162. CODIS, National DNA Index System, http://www.fbi.gov/hq/lab/codis/national.htm (last visited Jan. 28, 2008).

163. Many states have pending legislation to expand DNA databases to include individuals who have been arrested or charged with crimes other than sex offenses. *See generally* Gordon Thomas Honeywell, Governmental Affairs, 2007 DNA Database Expansion Legislation, *available at* http://www.dnaresource.com/documents/2007DNAExpansionbills.pdf (listing all pending state bills that would expand DNA databases to include additional offenses). For example, Alaska has a bill pending that would expand its DNA database to include anyone charged with a felony offense. *Id.*

164. *See, e.g.*, Colo. Rev. Stat. § 24-72-303 (2007); Bureau of Just. Stat., U.S. Dep't of Just., NCJ 210297, Survey of State Criminal History Information Systems, 2003 1, 8 (2006).

Some states, for a small fee, provide some portion of a person's state criminal rap sheet information upon request.[165] In fact, a few states provide this service online.[166]

Public Law 92-544, which Congress passed in 1972, permits states to authorize their criminal records repositories to request FBI background checks on behalf of private employers.[167] Provided that the state has laws in place that authorize FBI background checks on behalf of private employers, these employers can process background checks through their state criminal records repository.[168] According to the National Task Force on the Criminal Backgrounding of America (NTFCBA), states have passed more than a thousand laws authorizing various employer groups to initiate federal criminal background checks of their employees and job applicants.[169] The FBI requires that these searches be based upon fingerprints before access is allowed under Public Law 92-544.[170]

Fingerprint submissions to the FBI for non-criminal justice checks now outnumber criminal justice checks, with approximately ten million non-criminal justice checks processed in 2005.[171] Non-criminal justice requests are provided to both public and private employers who ask for an FBI criminal background check.[172]

In fact, fingerprint background checks of prospective employees are increasingly becoming routine. For example, after September 11th, the Air Line Pilots Association estimated that "up to 1 million aviation employees who have access to secure areas will be fingerprinted, because no screeners had FBI background checks up to 1998 and no pilots prior to 1996."[173] Indeed, it was only after September

165. *See* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 4 ("Some states even made name checks of their repositories records available on the Internet for a fee."); *see also* SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, SURVEY OF STATES THAT PROVIDE SOME LEVEL OF 'OPEN' ACCESS TO THEIR CRIMINAL HISTORY RECORD (2001), *available at* http://www.search.org/files/pdf/open_records_survey.pdf ("All surveyed States charge fees to provide rap sheet information . . . .").

166. *See, e.g.*, Fla. Dep't of Law Enforcement, Obtaining Criminal History Information, http://www.fdle.state.fl.us/CriminalHistory/ (last visited Nov. 26, 2007) (charging a $23 fee for a criminal history record check).

167. Pub. L. No. 92-544, 108 Stat. 1109, 1115 (1972).

168. *Id. See also* REPORT OF NTFCBA, *supra* note 51, at 7.

169. CJIS Information Letter, U.S. Dep't of Justice, (Apr. 6, 2001), *available at* http://www.doj.state.wi.us/les/law/docs/20010406_infoletter1.doc. *See also* REPORT OF NTFCBA, *supra* note 51, at 6–7.

170. *Id.*

171. *See* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 3.

172. *See* Pub. L. No. 92-544, 108 Stat. 1109, 1115 (1972).

173. Ron Scherer, *New Step For Job Applicants: FBI Checks*, CHRISTIAN SCI. MONITOR, Feb. 1, 2002, at 3.

11th that Congress passed a number of laws that required background checks for workers in airlines and other transportation industries.[174]

Momentum toward more access to state criminal records has also been generated by Megan's Laws that make sex offenders' identities, addresses, and crimes publicly available over the Internet. In 1990, Washington State passed the first Community Protection Act authorizing public agencies to release information to the public about sex offenders.[175] In the mid-1990s, Megan's Laws swept the country after New Jersey passed a sex offender registration and community notification law in response to the rape and murder of seven-year-old Megan Kanka by a twice-previously-convicted sex offender.[176] Today, all fifty states have Megan's Laws that enable anyone to search for sex offenders by name or county of residence on a state sponsored website.[177]

These on-line, publicly accessible state websites usually include the sex offender's name, photo, address, and conviction offense.[178] Under some versions of the law and for some categories of sex offenders, the government affirmatively brings the sex offender's identity and whereabouts to the attention of the public by newspaper or oral communication.[179]

Furthermore, the federal 2006 Adam Walsh Child Protection and Safety Act[180] practically guarantees that every state will have an on-line sex offender registry. The Act calls for the United States Attorney General to promulgate guidelines for state sex offender registries and threatens states that do not comply with registry requirements by

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174. *See infra* notes 202–05 and accompanying text.

175. WASH. REV. CODE ANN. § 4.24.550 (West 2005); *see* Julia Sommerfeld, Lesser Crimes & Offenses – Sex Offender Registries, http://social.jrank.org/pages/1292/Lesser-Crimes-Offenses-Sex-Offender-Registries.html (last visited Jan. 29, 2008) (reporting that in 1990 "Washington state enacted the first legislation under which authorities notify the public of the release of a dangerous sex offender.").

176. N.J. STAT. ANN. §§ 2C:7-1 to -19 (West 2005). For background on the law see E.B. v. Verniero, 119 F.3d 1077, 1081–87, 1128 (3d Cir. 1997) (upholding the law against constitutional attack).

177. *See* Nat'l Ctr. for Missing & Exploited Children, Child-Sexual-Exploitation State Resources, Megan's Law, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1345 (last visited Feb. 22, 2008) (providing links to information regarding each state's Megan's Law).

178. *See, e.g.*, Office of the Attorney Gen., Cal. Dep't of Justice, California's Megan's Laws, http://www.meganslaw.ca.gov/ (last visited Jan. 29, 2008).

179. *See, e.g.*, WASH. REV. CODE ANN. § 4.24.550 (West 2005) ("The county sheriff . . . shall cause to be published by legal notice, advertising, or news release a sex offender community notification . . . .").

180. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C.).

2009 with loss of federal funds.[181] The Act further requires the FBI to create and maintain a national sex offender registry that will combine all the state registries.[182]

Following the model of Megan's Law and the Adam Walsh Act, at least three states—Kansas, Montana, and Oklahoma—have created violent offender registries.[183] These states basically require that a first-time offender remains on the registry for at least ten years and that a repeat offender remains registered for life.[184] There have also been proposals in several states to create similar registries for hate crime offenders.[185] Thus far, however, none have become law.

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181. *Id.* §§ 112, 125, 120 Stat. at 593, 598–99. For the Attorney General's proposed guidelines, see OFFICE OF ATT'Y GEN., U.S. DEP'T OF JUSTICE, NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION: PROPOSED GUIDELINES (2007), *available at* http://www.ojp.usdoj.gov/smart/pdfs/proposed_sornaguidelines.pdf.

182. Adam Walsh Child Protection and Safety Act § 119.

183. *See* KAN. CRIM. PROC. CODE ANN. §§ 22-4901 to -4910 (West 1971 & Supp. 2007); MONT. CODE ANN. §§ 46-23-501 to -520 (2007); OKLA. STAT. ANN. tit. 57, § 581–90 (West 1991 & Supp. 2007). In addition, Illinois has a registry for offenders who have committed violent crimes against youths. 730 ILL. COMP. STAT. ANN. 154/1–154/9999 (West 2007). A similar registry has been proposed in Connecticut. *See* S.B. 708, 2007 Gen. Assemb., Jan. Sess. (Conn. 2007).

184. KAN. CRIM. PROC. CODE ANN. §§ 22-4906(a) (West 1971 & Supp. 2007) (requiring that first-time violent sex offenders register for ten years and repeat offenders register for life); MONT. CODE ANN. §§ 46-23-506 (2007) (requiring sex offenders to register for life, and violent offenders to register for ten years after the first offense and for life after the second offense); OKLA. STAT. ANN. tit. 57, § 583 (West 1991 & Supp. 2007) (requiring that first-time sex offenders register for ten years and that persons classified as a habitual or aggravated sex offender be listed for life).

185. California Assemblyman George Runner proposed a Hate Crime Registration Act in 2000 that would have required all individuals who had been convicted of a hate crime (defined as a crime based on the color, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation of the victim) to register with law enforcement authorities. Charles F. Bostwick, *Statewide Hate Crime Tracking Law Proposed*, L.A. DAILY NEWS, Feb. 5, 2000, at 1. In spring 2006, a Texas defendant who had previous hate crime involvement was charged with a gruesome attack on an Hispanic teenager. Bill Murphy, *Lawmaker Wants Hate Crime Registry*, HOUSTON CHRON., May 9, 2006, at 1. In response to public outrage, State Senator Rodney Ellis promised to propose a law to create a statewide hate crime registry. *Id.* (reporting Ellis as saying in support of such a proposal, "If registration is good enough for sex offenders, it's good enough for skinheads . . . ."). Anti-Defamation League (ADL) chapters in San Diego, California, and St. Louis, Missouri have created their own hate crime registries which "collect, analyze, and make available hate crime and bias-motivated data on a county-wide basis." ANTI-DEFAMATION LEAGUE, HOW TO COMBAT BIAS AND HATE CRIMES: AN ADL BLUEPRINT FOR ACTION 12, 62 (2003), *available at* http://www.adl.org/blueprint.pdf (discussing the San Diego project); *see also* Anti-Defamation League, Confronting Hate: ADL 1998 Annual Report, *available at* http://www.adl.org/annual_report/1998/confronting_hate.asp (last visited Dec. 19, 2007) (discussing the St. Louis ADL's involvement in a task force charged with establishing a hate crimes registry). Of course, the ADL cannot require anyone to register; it collects, stores, and disseminates information about hate crime offenders. *See*

An increasing number of states are making it easier for any person, for any purpose, to obtain anyone's criminal record.[186] A 2006 SEARCH (National Consortium for Criminal Justice Information and Statistics) survey found that twenty-five of thirty-four responding states made name-only searches of criminal history records available to the public.[187] Fifteen states allowed searches by means of telephone, mail, or website queries, and ten states provided for searches of court records.[188] Twenty-five of the thirty-four responding states also allowed members of the public to initiate fingerprint-based record searches of state criminal records.[189]

State laws may conflict when a private employer asks to initiate a state and national criminal background search of a prospective employee via the FBI's III. This could occur when an employer in a state with liberal access laws asks for a national search on a person who has a criminal record in a state with more privacy protection for criminal records. To provide for resolution between state law conflicts, the 1998 National Crime Prevention and Privacy Compact (the Compact) established a reciprocal system of automated record exchange among the states for background checks for non-criminal justice purposes.[190] The Compact provides that the *requesting* state's law governs, thereby permitting the requesting state to obtain criminal record information from a sister state that does not make criminal records available to a similar in-state employer.[191] Perhaps for that reason, however, only a

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ANTI-DEFAMATION LEAGUE, HOW TO COMBAT BIAS AND HATE CRIMES: AN ADL BLUEPRINT FOR ACTION, *supra* at 62.

186. *See* BJS PRIVACY TASK FORCE REPORT, *supra* note 7, at 1.

187. *See* SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS., STATE CRIMINAL HISTORY RECORD INFORMATION AVAILABILITY SURVEY 2 (2006), *available at* http://www.search.org/files/pdf/Availability_Survey_031407.pdf [hereinafter SEARCH STATE RECORD AVAILABILITY SURVEY]. *See also* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 40 (reporting on SEARCH's 2006 survey).

188. SEARCH STATE RECORD AVAILABILITY SURVEY, *supra* note 187, at 9–13. *See also* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 40.

189. SEARCH STATE RECORD AVAILABILITY SURVEY, *supra* note 187, at 9–13. *See also* ATTORNEY GENERAL'S REPORT, *supra* note 29, at 40.

190. *See* National Crime Prevention and Privacy Compact Act of 1998, Pub. L. No. 105-251, 112 Stat. 1870 (codified as amended at 42 U.S.C. §§ 14601–16 (2000)); Fed. Bureau of Investigation, National Crime Prevention and Privacy Compact, http://www.fbi.gov/hq/cjisd/web%20page/cc.htm (last visited Nov. 27, 2007). *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 171671 NATIONAL CRIME PREVENTION AND PRIVACY COMPACT: RESOURCE MATERIALS (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ncppcrm.pdf (describing the Compact, the III, and how they operate).

191. 42 U.S.C. § 14616; National Crime Prevention and Privacy Compact, *supra* note 190.

bare majority of states have elected to ratify the Compact.[192] Recognizing this continuing conflict, the National Task Force on the Criminal Backgrounding of America recommended federal legislation that would provide certain employers with direct access to criminal records in all fifty states, thereby displacing altogether the need for the Compact.[193]

B. Federally Permitted and Mandated Criminal Background Checks

The FBI historically treated individual criminal history records as confidential—they were only to be shared with local, state, and federal law enforcement agencies.[194] In more recent years, however, Congress has passed laws compromising the confidentiality of such records by permitting as well as mandating federally-initiated background checks for non-criminal justice purposes.

First, Congress has passed a series of laws permitting or authorizing background checks. For example, in 1972 Congress passed legislation to provide for release of criminal records to officials of federally-chartered or insured banking institutions and—if authorized by state statute and approved by the United States attorney general—to officials of state and local governments for purposes of employment and licensing.[195] Then, in 1975, Congress amended the Securities and Exchange Act of 1934 to permit the Attorney General to release rap sheets to self-regulatory organizations in the securities industry.[196] In 1986, Congress also authorized the release of individual criminal history files to licensees or applicants for Nuclear Regulatory Commission licenses.[197] The 1993 National Child Protection Act allows all businesses or organizations that employ a childcare provider to ask a state agency to check the NCIC for all job applicants.[198] Congress

192. Only twenty-seven states have ratified the Compact. National Crime Prevention and Privacy Compact, *supra* note 190; FBI - Compact Council-Participating States, http://www.fbi.gov/hq/cjisd/web%20page/ccstates.htm (last visited Nov. 27, 2007).

193. ATTORNEY GENERAL'S REPORT, *supra* note 29, at 77–78; REPORT OF NTFCBA, *supra* note 51, 10–11.

194. For information regarding the FBI's historical commitment to protecting the confidentiality of criminal records, see U.S. Dep't of Justice v. Reporters Comm. for Free Press, 489 U.S. 749, 752 (1989); *see also* 28 C.F.R. § 20.1 (2007).

195. *See* Pub. L. No. 92-544, 86 Stat. 1109, 1115 (1972).

196. *See* 15 U.S.C. § 78(q)(f)(2) (1982 ed., Supp V). *See also Reporters Comm. for Free Press*, 489 U.S. at 753.

197. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99–399, § 606, 100 Stat. 853, 876 (1986) (codified at 42 U.S.C. § 2169(a) (2000)).

198. Pub. L. No. 103-209, 107 Stat. 2490 (codified at 42 U.S.C. § 5119 (1993)).

passed the Housing Opportunity Program Extension Act in 1996, which requires police, upon request, to conduct background checks on federally funded housing authority tenants and applicants.[199]

While Congress had previously *permitted* access to criminal records, it began to *mandate* background searches through other more recent legislation. For instance, the September 11th terrorist attacks led to legislation mandating criminal history background checks for millions of persons.[200] The Patriot Act, passed by Congress in October 2001, directs the criminal backgrounding of hazardous material transporters,[201] and is estimated to create 3.5 million checks per year.[202] Other laws mandate background checks for potential employees who would: (1) have access to controlled areas of maritime facilities[203] or biological agents;[204] or (2) work as airport and airline employees, air marshals, other transportation personnel,[205] or private security officers.[206]

Congress has continued to consider various proposals for mandating more criminal background checking. The 2003 Protect Act directed the DOJ to conduct a study to determine the feasibility of requiring fingerprint-based criminal background checks for all members of voluntary associations that provide programs or services to children.[207] This Act funded an eighteen-month pilot program to conduct background checks of 100,000 volunteers associated with three

199. Pub. L. No. 104-120, § 9, 110 Stat. 834, 836 (1996) (codified as amended at 42 U.S.C. § 4237(d) (2000)).

200. *See supra* Part V.A.

201. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 5103(a), 114 Stat. 272, 396 (2001) (codified at 49 U.S.C. § 5103(a) (2007))

202. REPORT OF NTFCBA, *supra* note 51, at 1.

203. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 70105, 116 Stat. 2064, 2073.

204. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 201, 116 Stat. 594, 639 (2002) (codified as amended at 7 U.S.C. § 8401(e)(3) (2007)).

205. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 138, 115 Stat. 597, 639 (2001) (codified at 49 U.S.C. § 44936).

206. In 2004, after finding that private security officers should be "thoroughly screened and trained," Congress passed the Private Security Officer Employment Authorization Act (PSOEAA) which authorizes private security companies to obtain information on employees or potential employees from the FBI's criminal history records. Pub. L. No. 108-458, § 6402–03, 118 Stat. 3638, 3755–56 (codified as 28 U.S.C. § 534 (2004)). *See also* 28 CFR pt. 105 (2007) (providing the Department of Justice's regulations implementing the PSOEAA).

207. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 108, 117 Stat. 650, 655–59 (2003) (codified at 42 U.S.C. § 5119a note).

organizations: the Boys and Girls Clubs of America, the National Mentoring Partnership, and the National Council of Youth Sports.[208] In 2005, Congress extended this program for an additional thirty months.[209]

Congressional interest in mandating criminal background information culminated in the Intelligence Reform and Terrorism Prevention Act of 2004, which required the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes."[210] In 2006, the Attorney General issued a report recommending more access to FBI criminal records for private employers.[211]

VI.
REFLECTIONS ON POLICY

A. Problems—Current and Potential

The three major national criminal records systems—the III, NCIC, and NICS—and the state databases that are linked through

208. *Id.* For examples of associations that require these background checks see American Red Cross, Louisville Area Chapter, Background Checks, http://www.louisville-redcross.org/NETCOMMUNITY/Page.aspx?pid=314&srcid=291 (last visited Feb. 25, 2008); Ride Connection, Volunteering, http://www.rideconnection.org/volunteering/volunteerOpportunities.htm (last visited Feb. 25, 2008); 4-H Youth Development, 4-H Volunteer Information http://highland.osu.edu/4h/volinfo.htm (last visited Feb. 25, 2008); Virginia Dep't of Criminal Justice Services, Law Enforcement Services, McGruff House Programs, http://www.dcjs.virginia.gov/cple/cpc/mcgruff.cfm (last visited Feb. 25, 2008); Big Brothers Big Sisters, Volunteering, Be a Big Sister, http://www.bbbs.org/site/c.diJKKYPLJvH/b.2286705/ (last visited Feb. 25, 2008); Goodwill, Doing Good with Goodwill: Volunteer Program, http://www.giin.org/EandV/VolOps.htm (last visited Feb. 25, 2008); American Camp Association, Criminal Background Checks Update, http://www.acacamps.org/campline/02f_background.php (last visited Feb. 25, 2006).

209. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1197, 119 Stat. 2960, 3131 (2006) (codified at 42 U.S.C. § 5119a note).

210. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6403(d), 118 Stat. 3738, 3759 (2004).

211. ATTORNEY GENERAL'S REPORT, *supra* note 29, at 7 ("When a private employer or entity can inquire into whether an applicant or employee has a criminal history, a process should be available that allows the employer to determine whether the response to the question is truthful and complete. We think that the fingerprint-based criminal history information maintained by the FBI and state record repositories should be one of the authorized sources of information for this purpose, as system capacity allows, so long as the process provides appropriate privacy protections to the individual and respects state and federal laws designed to ensure that criminal records are not used to unfairly deny employment.").

them provide many benefits. Most notably, they improve the efficiency of the criminal justice system and make it possible to instantly establish the eligibility of prospective purchasers of firearms. Commercial information vendor databases also benefit the community by arming employers, landlords, and a host of other private sector members with criminal background information on persons they seek to put in positions of trust.

These systems and databases, however, also cause problems. They may make convictions and arrests easily available to the public. The more accessible these records, the more likely the stigma of a criminal conviction, or even an arrest, will endure. This stigma will likely have negative repercussions for an individual's future interactions with criminal justice and other government agencies as well as with future employers, landlords, voluntary associations, and social companions.

Before the advent of these criminal records systems, individuals may have escaped their criminal past and begun new life in a different town, city, or state. In effect, the information technology revolution and the criminal records systems and databases that it has spawned return society to a kind of small town life where practically everyone knows or has access to everyone else's personal history, especially their contact with the criminal justice system.

The problem, then, is how to promote the reintegration of ex-offenders into a society apt to reject criminals. If ex-offenders are rejected and treated as criminals, they may, by force of both limited opportunities and self-fulfilling prophesy, behave consistently with their criminal label. The problem is exacerbated by new files, such as the Protection Order and Immigration Violators files that are accessible through the NCIC, which place a cloud over the character of people who may never have been convicted or even arrested for a crime.

B. Limited Policy Options

Some people still propose reining in access to criminal records, perhaps by making the records available only on a need-to-know basis.[212] Unfortunately, in our opinion, it is now too late to place any confidence in such "reform" strategies. The informational infrastructure is too large, too entrenched, and too useful to too many people to make its contraction even a remote possibility. Even if there emerged

212. *See, e.g.*, Pager, *supra* note 4, at 961 n.39; Stephen Saltzburg & Margaret Love, Editorial, *Seal Stale Convictions*, USA TODAY, Aug. 31, 2007, at A12 ("Records should remain open to law enforcement and others with a special need to know.").

a political constituency for making criminal records less accessible, the logistics of changing direction in the face of the three major federal criminal records systems and private commercial information vendors would be an insurmountable challenge. For example, restricting access to the federal NCIC and the state-level criminal records repositories would achieve little, if anything, if court records were still open to commercial information vendors and the general public.

If criminal record creation and dissemination cannot be effectively curtailed, other policy interventions will be necessary to ameliorate the consequences of a criminal conviction. The most obvious of these is prohibiting or regulating public and private discrimination based upon criminal record. Examining the political and administrative possibilities of this strategy is beyond the scope of this essay. There are, however, several federal and state laws prohibiting employment discrimination based upon arrests and some kinds of convictions. For example, some states, like New York, prohibit employment discrimination based on a conviction unless the conviction is relevant to the duties of the job.[213] The problem is that these laws are very difficult to enforce. Employers may actually disqualify job applicants based on a criminal record, but offer other reasons or no reason at all for having rejected the ex-offender in favor of another job applicant.[214] It also seems unfair to make particular employers shoulder the risk of ex-offender unreliability and dangerousness in order to serve the interests of the larger society.

Therefore, strategies should be implemented that spread the cost of providing a second or even third chance to ex-offenders. One such program, for example, could extend tax incentives to employers who agree to hire all or some specified categories of ex-offenders. In fact, one version of this strategy was attempted during the 1970s, but was judged unsuccessful.[215] It would probably be even more difficult to implement this sort of reentry program today because people may liken it to affirmative action for ex-offenders and would complain that it disadvantaged law-abiding, out of work job applicants. Of course, the same criticism could be made of all specially targeted in-prison or

213. *See* N.Y. EXEC. LAW § 296(15) (Consol. 1995); N.Y. CORRECT. LAW §§ 750–53 (Consol. 2005).

214. *See* Pager, *supra* note 4, 955–56 (2003) (providing a study where 50% of employers turned down equally qualified applicants on the basis of criminal records).

215. *See* Targeted Jobs Credit, Pub. L. 95-600, § 321, 92 Stat. 2763, 2830 (1978); James B. Jacobs, Richard McGahey, & Robert Minion, *Ex-offender Employment, Recidivism, and Manpower Policy: CETA, TJTC, and Future Initiatives*, 30 CRIME & DELINQUENCY 486, 490–500 (1984) (discussing the Targeted Jobs Tax Credit and evaluating its effectiveness).

out-of-prison employment programs, but there is no way to address the reentry problems of ex-offenders without treating them specially.

One other set of strategies would include lessening the stigma attached to a criminal conviction. This might include a public relations campaign that would try to make known facts about the reliability of all or at least certain subcategories of ex-offenders. The government could implement employment programs, whereby ex-offenders work for the government or the government could place ex-offenders in special private or voluntary sector jobs. This would aim not only to provide ex-offenders with marketable job skills, but also to provide them with positive references from these employers and contribute to the creation of a positive curriculum vitae. As a result, it might become known that ex-offenders, who had worked for a year or more for certain government programs and earned strong recommendations from that program's supervisors, were highly likely to be reliable and competent employees. While such a program would help, this also asks a lot of the governmental organization tasked with running the program. Moreover, such a program would not be able to help those ex-offenders who could not meet the program's requirements and who did not earn positive recommendations from supervisors.

While there are no easy answers, society should not stop searching for solutions. There is no doubt that society faces a huge challenge in reintegrating ex-criminals into the societal mainstream. The problem has become more acute because information technology makes criminal records much more accessible. While the expanding scope, use, and availability of criminal records may have helpful consequences for effective law enforcement and even for effective employment decisions, it makes the formation of a permanent criminal underclass more likely and intractable.